

## **REMARKS**

Claims 1-6, 23, 25-27 and 37-46 are pending in the present application. Claims 1-6, 23, 25-27, and 42-43 are withdrawn. Reconsideration of the claims is respectfully requested.

### **I. 35 U.S.C. § 121**

The Office Action requires a restriction to one of the following sets of claims:

- I. Claims 1-6, 23, 25-27 and 42-43;
- II. Claims 37-41 and 44-46.

In response to the Restriction Requirement, Applicants elect invention II, claims 37-41 and 44-46, with traverse. In issuing the Restriction Requirement, the Examiner states:

2. This application contains claims directed to the following patentably distinct species of the claimed invention:

a) Species I, a method of placing the data into the inode when space is available and whether the size for additional data is divisible by a block defined by claims 1-6, 23, 25-27, and 42-43, as illustrated on figures 6- 7, and paragraphs [0042], [0047].

b) Species II, a method of placing remainder data is less than the block size defined by claims 37-41, and 44-46, as illustrated on figure 4, and paragraphs [0037], [0038].

Applicant is required under 35 U.S.C. 121 to elect a single disclosed species for prosecution on the merits to which the claims shall be restricted if no generic claim is finally held to be allowable. Currently, no claim is generic.

Applicant is advised that a reply to this requirement must include an identification of the species that is elected consonant with this requirement, and a listing of all claims readable thereon, including any claims subsequently added. An argument that a claim is allowable or that all claims are generic is considered nonresponsive unless accompanied by an election.

Upon the allowance of a generic claim, applicant will be entitled to consideration of claims to additional species which are written in dependent form or otherwise include all the limitations of an allowed generic claim as provided by 37 CFR 1.141. If claims are added after the election, applicant must indicate which are readable upon the elected species. MPEP § 809.02(a).

Should applicant traverse on the ground that the species are not patentably distinct, applicant should submit evidence or identify such evidence now of record showing the species to be obvious variants or clearly admit on the record that this is the case. In either instance, if the examiner finds one of the inventions unpatentable over the prior art, the evidence or admission may be used in a rejection under 35 U.S.C. 103(a) of the other invention.

Applicant is advised that the reply to this requirement to be complete must include an election of the invention to be examined even though the requirement be traversed (37 CFR 1.143).

A telephone call was made to Mr. Neil Ferrair on 1211 512008 to request an oral election to the above restriction requirement, but did not result in an election being made.

Applicant is reminded that upon the cancellation of claims to a non-elected invention, the inventorship must be amended in compliance with 37 CFR 1.48(b) if one or more of the currently named inventors is no longer an inventor of at least one claim remaining in the application. Any amendment of inventorship must be accompanied by a request under 37 CFR 1.48(b) and by the fee required under 37 CFR 1.17(i).

Restriction Requirement dated December 26, 2008.

The Examiner has not made a *prima facie* showing of serious burden, as required by the MPEP in making a proper Restriction Requirement. According to MPEP § 803(I), there are two criteria for a proper Restriction Requirement: (i) the inventions must be independent or distinct as claimed, and (ii) there would be a *serious burden* on the Examiner if restriction is not required. MPEP § 803(II) recites as follows:

For purposes of the initial requirement, a serious burden on the examiner may be *prima facie* shown <sup>\*\*</sup>by appropriate explanation of separate classification, or separate status in the art, or a different field of search as defined in MPEP § 808.02.

MPEP § 803 (II).

As shown in the cited portion of the Restriction Requirement reproduced above, the Examiner has not explained separate classification, separate status in the art, or a different field of search. In fact, the Examiner has made no explanation whatsoever regarding the serious burden requirement for a proper Restriction Requirement. Because the Examiner has failed to make a *prima facie* showing of serious burden, the Restriction Requirement is improper and should be withdrawn.

Nevertheless, Applicants must make an election. Applicants elect invention II, claims 37-41 and 44-46, with traverse. In accordance with 37 C.F.R. 1.142, claims 1-6, 23, 25-27, and 42-43 to non-elected invention I, are hereby withdrawn, subject to reinstatement in the event this Requirement is withdrawn or overruled.

## II. Conclusion

The Examiner is invited to call the undersigned at the below-listed telephone number if in the opinion of the Examiner such a telephone conference would expedite or aid the prosecution and examination of this application.

DATE: January 26, 2009

Respectfully submitted,

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